

LAKE COUNTY BOARD of ADJUSTMENT
May 9, 2018
Lake County Courthouse Commissioners Office (Rm 211)
Meeting Minutes

MEMBERS PRESENT: Don Patterson, Frank Mutch, Steve Rosso, Mary Jensen

STAFF PRESENT: Jacob Feistner, Rob Edington, Clint Evenson, Tiffani Murphy, Lita Fonda; Wally Congdon

Frank Mutch called the meeting to order at 4:02 pm

AKSHUN CONDITIONAL USES—FINLEY POINT (4:02 pm)

Tiffani Murphy presented the staff report. (See attachments to minutes in the May 2018 meeting file for staff report.)

Jim Atkinson, agent for the applicant from J Designs, described the concrete walkway as roughly 5 feet wide in response to Steve, who noted the lakeshore regulations allowed 5 square feet per linear foot of frontage. Tiffani explained they hadn't looked at the lakeshore protection zone since the proposed project was outside of that. Steve was thinking about mitigating the enlarged surface area and the impacts on the lake.

Tiffani noted that George Brimhal, referred to in the letter from Steve Boyce [neighboring landowner], was the owner of Akshun & Akshun, in response to Frank's query.

Jim Atkinson checked regarding condition #6 that the stormwater plan was not required for the rest of the property and what had been in place. Tiffani said the applicants would show how they would keep the stormwater from running into the lake off of the existing concrete. She mentioned the boat ramp. She confirmed for Jim that this was just the new construction, and they weren't looking at the other lot. Regarding the buffer zone and vegetation, Jim said large trees grew along the south portion of the property. They were only going about 28 feet closer to the southern property from what existed already. A lot of trees were there. He mentioned a secondary buffer that was there.

Steve Boyce asked what kind of buffer would be required there. It was pretty sparse, with trees maybe 10 feet apart. You could see through it. Down below, they'd put in a row of spruce trees for screening. That was his idea of a buffer. He asked if that could be screened off. Jim said that in a phone conversation, Steve B said he would be open to putting more trees there. Jim was happy to help with the buffer plan.

Steve R noted with conditional uses and variances, it was an opportunity to try to mitigate impacts of that. Maintenance of the buffer area was limited in the regulations. Fertilizers, pesticides and herbicides were not to be used in the buffer strip. Jim didn't know if that was being met. Steve R asked if Jim thought the owners would be open to helping mitigate the increase in impervious surface area by beginning to restore some

buffer by planting some other things besides lawn. Jim pointed out the large mature trees in the strip. Steve R said it was hard to see that. The nearest tree looked to be about 20 feet away from the retaining wall. Jim believed the owners might be open to that kind of mitigation but around the boat house, there were big trees. Steve R mentioned there needed to be a variety of plants. The buffer zone was 50 feet wide. Brian Zimmerman, who worked for George Brimhal, said there were several flower beds and native plants in the 50-foot zone. Brush was on the north end of the property, probably 10 feet from the water's edge. Jim clarified that the same owner owned the property to the north. The north lot had a garage, house and the majority of the driveway. Steve R summarized that the visual buffer recommended to the south was because someone else owned that property to the south.

Public comment opened:

Steve Boyce asked about a master plan for the property besides the house. Jim said just the driveway came into the top at this time.

Jim offered to show pictures of landscaping to the Boards.

Public comment closed.

Steve R made suggestions for the findings and conditions:

- Pg. 15, #2, second paragraph: Towards the end of the 4th line, add 'that includes a vegetative buffer strip adjacent to the lakeshore'. He thought they should see in the stormwater management plan that there was a vegetative buffer that was judged to be adequate by having a variety of plants with roots at different depths to use the nutrients out of the groundwater and prevent them from reaching the lake.
- Pg. 16, #4.v: Add 'to mitigate visual impacts from the adjacent parcel' to the end.
- Pg. 17, #6: Add 'if all other conditions are met' to the end of the italicized portion.
- Pg. 19, conditions #2 and #3: Change the very specific amounts of coverage of 15,854 and 4,354 respectively to somewhat more general numbers to allow a little elbow room, so change to 16,000 and 4,500 respectively. Jacob asked if that was intended as exact or approximate. The current numbers were approximate. The tolerances on those were unknown. Steve thought rounding them up a little might be a simple way to handle that, even if they still had a tolerance on them.
- Pg. 19, condition #6: As with pg. 15, #2 add 'that includes a vegetative buffer strip adjacent to the lakeshore' after 'storm water management plan' in the first line.

Frank was concerned about expanding regulations beyond what was called for in the zoning. This application had nothing to do with the buffer strip. Regarding visual amenities, he liked to look at houses from the lake and thought most others did too. He thought the nutrients were an issue that they could mention but asked if it was proper to make it a condition of the permit when they talked about slopes. Jacob believed it was the Board's discretion to add conditions to the approval, which could include a visual

buffer. Frank thought there was a consensus between the neighbors that the visual buffer was appropriate. He was talking about looking out to the lake. He believed with the philosophy of preserving water. He wasn't sure if they should extend controls or just make a recommendation. Steve R said they hadn't added a condition to require restoring the buffer entirely. He was suggesting the stormwater management plan have some discussion in it of the buffer so when they were judging that stormwater plan, the staff also could judge if it adequately handled the water so it wasn't running off and would absorb, and that the water had a chance to get conditioned a bit before it ran into the lake. In the discussion of the buffer in the zoning regulations that applied in this location, it did talk about that if you didn't have a buffer right now, you didn't necessarily have to restore the buffer. If one was there, you needed to leave it and you were encouraged to restore it. It did require that no fertilizers, pesticides and herbicides shall be used in the buffer strip to prevent nutrients and other chemicals from entering Flathead Lake. If that were enforced for someone who had lawn along the lake, that person would soon decide to have bushes rather than dead grass and weeds. If they were going to follow the regulations, most property owners realized lawn didn't work well. It didn't protect the lake and it didn't look very good.

Wally said when these neighbors talked about the buffer strip and started to figure it out, the buffer wasn't just for visual. It was for light and sound. That worked both ways.

**Motion made by Steve Rosso, and seconded by Don Patterson, to approve the two conditional uses with findings of fact as modified and conditions as modified.
Motion carried, all in favor.**

FISHER CONDITIONAL USE—EAST SHORE (4:38 pm)

Clint Evenson presented the staff report. (See attachments to minutes in the May 2018 meeting file for staff report.)

Steve asked about Environmental Health's process and approval for moving a self-contained RV onto a property. Clint understood that a narrative discussion had to be written in prior to approval. They had to have a written plan on how wastewater, stormwater and sewage would be dealt with. Jacob noted that Environmental Health hadn't commented yet. Oftentimes they would have approval but it wouldn't be installed yet so they would have to be able to take the RV offsite to dump it. If it was installed, they could connect to it. Steve referred to the work described in the applicant's narrative involving preparing the site. It seemed like he ought to be allowed to park an RV there during that kind of work, which would be ahead of putting in a septic system.

Frank asked about attachment 5. Clint described the tree line beyond the gate as approximately where the property line began. He confirmed the applicants drove through the orchard to get to their property and the yellow building belonged to someone else. Steve checked that the easement was on the north edge of the property. The gate wasn't at the beginning of the easement. Jacob pointed out the easement on attachment 2B. Clint clarified they were looking east in the attachment 5 picture. Steve asked if the yellow house and the orchard were two different properties. Dan Getman, the orchard

owner, described where the property line was and verified this. The placard was on the property line with the easement to the right.

Public comment opened:

Dan Getman appreciated [the Board's] work and the question on the septic system. That was a main reason he was here. He and his wife grew sweet cherries in the orchard, and also other fruits and berries. Access was a major concern that needed to be discussed although it was a private matter so he wouldn't dwell on that. They had water rights that went through the property. He was the president of the Parker Creek Water Association, which was directly involved. Four property owners/orchardists had easements that took them up to Parker Creek, which was a mile up the mountain. The pipelines went through the Fisher property. It was his responsibility to make sure those pipelines weren't disturbed, were maintained and that they still had access. Certain provisions went along with that, as spelled out in the paperwork. They had to inspect it at least once a month. He turned it on in the spring and off in the fall. Generally he called the land owners and said he was going through. That was what good neighbors did. Their community counted on people getting along and helping one another. They also had Sully's (sp?) Spring that served them with water. It was right where the applicant wanted to put his structure and trailer. It was a big concern. Maybe a truck would empty out the RV septic. He didn't want the water to be contaminated. This was a big concern for the water right for his spring and for the Association spring.

Dan recalled in November 2010 Bobby Fisher and his wife moved the fence line over without notice so they would have 15 feet instead of the width of the gate, which was there when Dan bought the place in 2007. Bobby also left the gates open at the top and at the bottom. Fourteen trees were destroyed by deer. Dan asked why Bobby did that and was told he was making sure he had his 15 feet of easement, and that he didn't have to tell Dan. Dan let the damage go and left the fence where it was, with no apology or word from Bobby. Given this history, he felt dubious about how things would go here. His orchard had guests from all over the world. His cherries went to Europe and Asia, as well as locally. They might get 2000 visitors in July/August to see how they grew things in a natural way. Schools came. He was in favor of people doing what they wanted to do with their property and he didn't dispute the easement. Some consideration would be required. Bobby Fisher needed to talk to him to avoid trouble. He was opposed to granting a conditional use permit because it would open the door to trouble. He was unsure what the plan for septic was. Until that was resolved and they knew exactly what was going to happen, he could not be assured that his spring would not be contaminated. If they left the easement alone, he would stand on the spring issue alone. No plan was in place. He had to see the plan to feel comfortable about his water supply. He respectfully requested that the conditional use request be denied until they resolved his spring issues and also the water easement for him and 3 other orchardists. He showed paperwork that indicated the pathway of the water line, the properties, the spring and so forth. He noted the [water line] easement went right across the road that Bobby was planning on using.

Steve asked if surface water with a water right had to be marked like a ground water well would be with a septic system application. Was a 100-foot radius drawn around that

surface water in the case of a spring that would prevent the septic field from being within 100 feet? Wally said there was. Jacob said it was a domestic water supply. Wally said it was required to be 100 feet away from a surface water source. Steve said a condition included that Bobby get approval from the Environmental Health Department before he got approval to do work on the property, although it might not totally ease Dan's mind. They would review that kind of thing and make sure that the plans didn't affect the surface water within that distance. The Board would discuss the access easement, which was part of this because they couldn't approve someone developing unless they were sure emergency vehicles had access. He suggested that Dan consider the possibility of building a fence along that easement for the whole orchard. If other people accessed this along that easement due to an emergency, they might not respect the 'gates' issue.

Wally said it was possible to make a condition of approval in those circumstances that the person who had to have the access had to provide the mitigation. Also if the surface water source or spring source was ground in service, it wasn't a function of just citing it. You couldn't have a facility for a public or private water supply within 100 feet, which meant it wasn't just the drainfield. It might be that you couldn't put the RV dump there or the septic tank, etcetera, because they would be too close and would contaminate too much. The conditions might need to go so far as to say those rules had to be met. The problem you had was if you had more than 9 people on a [single water source], you became a public water supply, which had a higher standard and which had to be tested 4 times each year.

Mary asked if the easement was on the property when the applicant purchased it. Dan affirmed. The easement was developed with an owner named Janni years earlier. He showed pictures he'd taken. If they built a fence for the 15 feet, he'd have to remove 17 trees. Mary noted it was an easement. Steve said it was a hard thing when an easement was granted but wasn't being used. People flopped over into the easement without paying attention. Suddenly somebody wanted to enforce the easement and it wasn't on them. Dan said in the 12 seasons that they'd been there, they hadn't seen one vehicle except for one surveyor who left both gates wide open.

Public comment closed.

Clint pointed Steve to the second paragraph on the first page for the information in the staff report about the road easement and items the property owners would have to work out. Dan clarified that there was access from the easement to the subject property.

Steve:

- Pg. 11, Findings, #5: In the next to last line after 'schools', add 'as long as access for emergency vehicles is established to the site.'
- Pg. 12, Conditions & Terms, #3: Add 'and to demonstrate legal access for emergency vehicles has been established.'

Steve mentioned if someone was living on the property, the possibility of the gates getting left open was probably pretty high. Part of this would be doing what Dan needed

to do so the deer weren't chewing on his trees. Dan said he would need to be able to design the gate. He could require height. Steve said the land owners would have to work that out.

Frank referred to a fire truck turnaround and whether the access road would have to be to County standards. Steve thought they'd have to work out something for the driveway between the neighbors. There might be a new road maintenance agreement developed so the road being used to access irrigation facilities was the same road he was using, where they might be sharing the road access. The road might have to be improved. Someone from the fire department would have to look at it and write a letter to the Planning Office that said the access was good for emergency vehicles and fire trucks. Jacob clarified they would pull in the fire department if they were building a structure. At this point they were looking at a temporary building. He thought they were tying this to the zoning conformance for the structure. Condition #3 was just for the RV. Condition #5 would tie it to the house. Steve thought if the applicant was working on the property, they needed to have access for emergency vehicles. Dan noted that a truck couldn't get up that hill when it rained. Mary asked how heavy construction vehicles, such as cement trucks, would get through there. Frank thought they needed to watch the scope. Steve said a question was raised in the report that the access had to be worked out. It had to be worked out and completed before they got so far down the road that they created a problem. Frank thought it was reasonable to talk about access in #5.

Dan asked about safety. It was a huge issue if he had dogs, kids and people there along with traffic up and down. Steve thought that was why he might want a fence. Dan said the fence would have to have gates that opened up into the orchard. Steve thought that was part of what had to be worked out before homebuilding began. From a zoning standpoint, Jacob said they had to look for legal and physical access. What they did with the gates and the fences were between the neighbors. When they dealt with slope disturbance or coverage issues, they tied it to an actual structure and looked at whether or not the fire department had access to and could serve that property. This was just an RV. If they had concerns and would like fire department comment, they could put that in #5. Steve thought he'd like to have that in there somewhere since the question of access to the property had been raised. Jacob explained that the question was that when they went there, gates were across the access. Staff acknowledged there were gates here and the applicant would have to talk to his neighbor and figure out something. Steve wanted that done before he got a zoning conformance to build a house. Frank thought it was a moot issue since legal access was established, if that was the concern. He asked if driveway, driveway constructions and emergency vehicle turnaround was part of what they routinely review. Jacob said they'd gotten comment for fire truck access from the Bigfork Fire Dept. about the access for fire trucks. That was usually as far as they went.

Mary noted this was landlocked without the existing easement. Dan said a road went to it but it was on property that the applicant sold to the neighbor.

Steve, Pg. 12, Conditions & Terms, #5 instead of #3: Add 'and to demonstrate access for emergency vehicles has been established.' Jacob suggested for clarity, to define what

met the conditions. Steve appended 'by getting comments from the fire department' to the added comment and Mary further appended 'with jurisdiction'. Jacob asked what happened if the fire department said they couldn't get a truck in there. Mary said they worked on the road. Steve said the property owner had to improve the driveway until the fire department said yes, and then the zoning conformance permit could be issued. Don said there were a lot of properties. Frank thought they asked for comments from the fire dept. but they didn't make it a condition of approval.

Wally said it was commonly made a condition in subdivisions. A zoning conformance permit was different, where it conformed or not. The dilemma was the easement discussion was relevant. If you had an easement, you had the right to do the things the easement was for but you didn't eliminate the owner's use of that particular piece of property. He gave an example where he could run cattle on a road easement but couldn't irrigate and destroy the road. He could cut the hay on the sides of it and he could use that same road to get to his cows. The problem with the easement under discussion was they needed to figure out the balance. The bigger problem was if the pipes were under the road and a fire truck needed to go up it. If it was a bog because of no drainage and so forth, they weren't in the business of allowing zoning conformance for a particular use that could not conform and provide some of the most basic things they provided, like emergency access. The dilemma was there was no requirement for subdivision review on this parcel. It was created as an occasional sale under the old 1973 Subdivision and Platting Act. It was never reviewed for ingress/egress, access, fire department/emergency services but if the use was one that was proposed to conform with the zoning, and that use would require those things, what they were doing with conditions was reasonable. To say that the zoning allowed 'X', it was only reasonable to do that if you met this requirement. Fine. The bigger problem was if the fire truck couldn't get access, a fire could spread and become an issue to everybody so their conditions weren't unreasonable. It was hard to shift your head around the question of a subdivision, which was a blanket requirement versus a zoning ordinance when it was in front of you. The conditions needed to be reasonable and related to what the zoning said you're trying to achieve and then the conditions that Clint talked about were reasonable conditions to do. The zone wasn't just for the property—it was for the neighborhood. He gave the example of a condition that said the road easement strip couldn't be irrigated as a reasonable condition for the zoning, because the zoning allowed them to build a house. They just had to be careful and really think about what the conditions were relative to the zoning.

Steve read the bolded portion of Finding #5 on pg. 11. This staff report said access was a question. If they were required to make sure this property was served adequately by police and fire protection, he thought they were obligated to have a statement in there. Frank said it required both parties to cooperate. Steve said they'd have to come up with an agreement as to how the easement would be used if it wasn't well defined or established already. It seemed like the Board's responsibility was to make sure they did that before they got further down the road with construction and use of the property.

Jacob said that what he had to add for #5 was 'and demonstrates access for emergency vehicles by getting comments from the Bigfork Rural Fire Department. Steve reiterated

they wouldn't change #3 and would require the Environmental Health review before he moved the RV up there. Jacob said they would get that comment and the applicant would meet their requirements. Steve thought when they'd gotten comment from the fire department for variance or conditional use requests, if the fire department could not access a building, the Board had put in conditions. Wally reminded that in the findings, they could preserve, prevent harm and protect, and they were fine. Where they got into trouble was where they promoted something. He talked about how this example met those 3 'p's. When they did findings, if the planner's findings were specific to their conversation, make a sentence of those 'p' words that said what they were doing and why. That was the rational basis for why they were doing this.

Dan checked about the water quality of his spring. The group noted that Environmental Health would cover this.

Motion made by Steve Rosso, and seconded by Mary Jensen, to approve the conditional use request and approve the findings as modified and the conditions as modified. Motion carried, all in favor.

BLAKE-GIBSON VARIANCE—FINLEY POINT (5:39pm)

Rob Edington presented the staff report. Report revisions since the Feb. 14, 2018 meeting were shown in bolded italics. (See attachments to minutes in the May 2018 meeting file for staff report.) He also introduced agent Melissa Tuemmler of Carstens, members of the public Roger & Shawna Noble, and Dave DeGrandpre of Land Solutions. He highlighted the review was of lot 4, not the south half of lot 5. This was mentioned in the letter from Kalvig Law Firm. When the variance request was first received, a legal description referenced lot 4 plus the south half of lot 5. After the request was legally noticed, staff discovered there were 2 tracts of records. He outlined the public comment received, including 2 comments that were received today in opposition and handed out today to the Board. He handed out and talked about 6 additional pictures. He handed out pg. 1 and pg. 16 of the Finley Point zoning regulations. (See attachments to minutes in the May 2018 meeting file for handouts.) He highlighted and talked about portions from section I on pg. 1 and 2.c.1 on pg. 16 for the Board to consider. He also talked about 2.c.2 on pg. 16 and how this proposal might fit.

The current site plan (attachment10) came under discussion. Steve asked about the proposed storage building. Rob replied the proposal was to replace the original boathouse with the storage building in that location. He confirmed that the footprint was within that footprint. Jacob noted it was slightly smaller. Steve asked about the roofline or the walls of the structure on the new site plan. Rob said staff interpreted the original walls of the boathouse as the exterior of the structure. Overhangs were proposed. The proposed structure was smaller so he interpreted the finished roofline to be very close or slightly smaller than what was seen there. The latest pictures were taken today. Nothing had been done to remove the unpermitted construction work that was started a year ago. He confirmed for Steve that the dimensions on the site plan labeled as 'new' were never going to be there and at some point all of that had to be removed. His understanding was the site plan reflected the site 'as is' on 3/23/18. Frank asked if having the new,

unapproved structure still there was an issue. Rob said at this juncture, staff asked the applicants to cease all activity. Prior to construction, it would make sense that they would wait to see if they could salvage the foundation, for example, and to wait to see if they were able to rebuild the original structure.

Melissa Tuemmler of Carstens spoke as the agent for the project. The information provided was what was requested at the last BOA meeting. The site plan reflected what was there because that was what the Board wanted to see. It was redesigned according to what the neighbors had suggested.

Public comment opened:

Roger Noble was attending with his wife Shawna. They were the adjacent property owners to the east. They didn't take coming here to protest the variance lightly. It had taken a lot of their time, and also money in seeking additional opinions. When they left the last BOA meeting, the Board had voted 3 to 1 to deny the application. Then the Board made a motion to table it, which was 2 to 2 and died for a lack of a quorum. Wally spoke with them on their way out and they discussed what their concerns were. They reiterated their primary concerns were height, since it impeded their view, and aesthetics because of the surrounding compatibility. The existing structure was an old and innocuous little log cabin. They were good with that. However that structure had now been destroyed and the applicant was on the road to replacing that structure with a 2-story guest house. When they saw the second story on this thing, they talked to the applicants, who contacted the Planning Dept. and found out they were way out of compliance. They were now back [with the Board] for the same reasons.

Roger said no one seemed to be able to determine the height of the pre-existing structure. What the applicants proposed was not within the realms of what the Nobles previously discussed with Wally. Roger showed pictures on height, which he might have shown last time. (See attachments to minutes in the May 2018 meeting file for apparent handouts, as collected after the meeting.) He didn't understand why Carstens couldn't determine the height. His measurement was 7 ½ feet. The new construction map showed that the construction height would be 7 feet 9 inches. He didn't know where the 8 feet 6 inches came from. He thought the 7 feet 6 inches or 7 feet 9 inches were closer to the original height.

Roger noted the new construction diagram in the packet said 'new metal siding'. That was one of their big concerns they discussed when they were here before: the aesthetics of the structure. They didn't know the type of roofing materials that would be used. The applicants wanted to put on a flat roof so he assumed it would be steel. It sounded like a steel box, which wasn't very aesthetically appealing. In addition, there was no stormwater plan. They'd reiterated that at length during the February meeting. The applicants specifically did not follow the Noble's concerns. Neither the builder nor the consultant contacted them to say 'what can we do to work through this?'

Roger said that after they went out into the foyer with Wally, they listed their concerns. They said they would consider a resubmittal. They didn't think the applicants had met

that second chance. He gave Carstens credit for coming back with a very nice site plan. By the letter of the law, the application was still incomplete and deficient. Rather than reiterating his previously expressed concerns, he talked to Dave DeGrandpre (of Land Solutions) and Ken Kalvig, who specialized in land use deals in Flathead County, to get outside opinions and asked each to prepare a letter to the Board.

Roger then gave two more handouts to the Board. (See attachments to minutes in the May 2018 meeting file for handouts.) One was an aerial image with [Blake-Gibson] property outlined in red, [Noble] lot outlined in blue and [Sheneman] lot on the west outlined in purple, and the rough trace of the roadway, Skidoo Lane, in yellowish. He talked about some of the pictures that Rob handed out earlier and other properties and structures the applicants owned in the vicinity, which totaled about 12.5 acres with more than 1 property. The structure labeled as a guest cabin was a second house. Two families owned the property. In the summer, one stayed in the house above Skidoo Lane and the other stayed in the house below Skidoo Lane. The other handout showed a Carstens site plan where he'd added 8 numbered rectangles with the dimensions of the existing cabin to show other potential locations. This wasn't a hardship. For #1, you'd have to cut down a tree. Six trees had been cut down since the Nobles had been there. A trailer house had been parked for 4 or 5 years where #2 and #3 were. It recently was moved away when they started to build their 3rd guest house on the lake. To say there was a hardship with locating this elsewhere was a fallacy. He was on the Flathead County Board of Adjustment. When he asked himself if it met all of the criteria, clearly it did not. Next he asked himself if they set precedent by approving this application. The old structure was destroyed. The applicants were essentially building a new structure. If he or the other neighbors came in next month and wanted to put a boathouse in the same type of position, would the Board approve it? They'd have to, if they approved this one.

The Nobles recognized the applicants spent a lot of money pouring a foundation and going vertically but they ignored the law. He didn't think the Board should reward them by approving a variance. They wanted to work through this, but the applicants kind of threw this in their face and didn't follow what they asked for. The Nobles weren't even contacted and now felt that maybe they shouldn't negotiate on this. He thought Dave DeGrandpre would speak, and noted that Dave and the attorney said essentially the same things in their letter.

Dave Degrandpre of Land Solutions (land use planners and landscape architects) used to work for Lake County Planning and was quite familiar with Finley Point zoning regulations and other Lake County zoning regulations. He respectfully disagreed with some of the findings in the staff report. In his view, this proposal didn't comply with several of the variance criteria. He touched on nonconforming uses. This structure was built prior to the zoning and on the property line, which didn't comply with today's rules. This happened all over the country. There were different ways to handle this. Lake County took a soft approach, which he appreciated and thought made a lot of sense. You could keep doing what you were doing today. You couldn't do two things: you couldn't expand it and if the structure was essentially destroyed or made unusable, then it needed to go away. The purpose was to do away with these nonconformities over time. The

applicants said in their application that this was no longer a usable structure. The roof caved in and the siding needed to be replaced. In his view, they proposed to create a new nonconformity. That wasn't something that zoning was set up to accomplish. It was set up to do away with nonconforming uses over time.

Secondly, Dave described that you had several review criteria with which to review and judge a variance request. Under the Finley Point zoning regulations, you must find that all of the review criteria were met. In his view, it didn't appear that they were. One said that strict compliance with the terms of these regulations would limit a reasonable use of the property and deprive the applicants the rights enjoyed by other properties similarly situated within the district. In this case, the reasonable use of the property was to have a storage building for lake-related toys. As Roger pointed out on his second exhibit, several places on the property existed, even on the north side of Skidoo Lane, where a lake-related storage structure could be located. The reasonable use was to have a lake-related storage building. You could have it within the 50-foot buffer but you didn't have to have it there. You could have it 200 feet away. That was common, to haul down a cooler or a canoe or kayak. It wasn't unusual and clearly wasn't a hardship. The most important point was that he didn't believe there was a hardship. A hardship was a condition that was unique to the property that was based on things like the topography, the configuration, the size of the lot. This was a narrow lot but there was clearly ample room for a structure to be located that complied with the zoning. The applicants stated that the reason for requesting this was to have a convenient location to store their equipment. He appreciated that. Convenience was quite a bit different than hardship. Hardship related to the physical characteristics of the property, not the personal circumstances of the owner. A hardship would make the property essentially unusable, or at least unusable for a reasonable use without a variance. That was clearly not the case here.

Dave offered two additional points. If there was a hardship, it was created by the applicant. They took an existing structure that was no longer usable and created a new foundation and built a structure without securing the proper permits. If there was a hardship, it was economic in this case, and these two were not criteria [for a hardship]. You had to find that these weren't the case. He believed they clearly were the case. These were conditions created by the applicant. It was an economic circumstance at this point. He respectfully requested that the Board deny the variance based on lack of compliance with the review criteria.

Public comment closed.

Frank said his impression of the site plan was that they owned two 75-foot lots since the [area outlined in] red was double the size of the blue. Someone in the audience pointed out the lakeshore portion was only 75 feet in width.

Jacob asked about the rail that was shown in the picture taken today. Shawna Noble identified that as their rail. Jacob and the Nobles briefly discussed this. Jacob asked if it crossed the property line, why they put the rail so close to the property line and if they'd

gotten a permit. Roger said the contractor put it there and got the permits. Jacob said they didn't get one. He thought it was a valid point that this neighbor [the Nobles] were also in violation. He wanted that to be clear. Generally a person cleaned up their own backyard before they cleaned up the neighbor's. The Nobles said the rail system pre-existed. There was a boathouse there that they got a permit to rebuild, and tried to recall the contractor and the timeframe. Jacob said he'd checked for a permit for it and one wasn't on record. They would get to talk about this more after the meeting. He just wanted it to be clear.

Melissa said when the Gibsons first got the letter from Planning staff, they immediately contacted Carstens, who contacted Planning staff to figure out what they needed to do. The Gibsons had cooperated 100% with everything. They'd done as much as they could. They admitted they had some bad advice. Someone told them that if they built within the existing structure that they didn't need a permit. She told them at the start that wasn't true. The intent was never to violate or ignore the regulations. She thought they'd done everything possible. It was brought up at the last meeting that if they did these things, the neighbors would reconsider. Now they were saying they weren't going to agree to it. It was really up to the Board at this point. She thought everything was done on the applicants' end that could be done.

Steve referred to the drawings showing the old structure and the new structure. The old structure drawings didn't have a height. The one height dimension they had for the new structure said 7 feet 9 inches. How high would it be to meet the neighbors' requirement? Roger said they measured 7 feet 6 inches at grade. He didn't know where Carstens got their additional foot of grade on that thing, since they'd said it was 8 feet 6 inches. Steve checked that this was because the exterior ground was higher than the floor. Melissa said they had to extrapolate since the original was gone. Steve checked that the drawing (attachment 11) showed that the ground was flat. It didn't show any slope to the land from one end of the building to the other. Was that the case? Melissa thought no. Frank thought it showed a berm. [Jacob] said there was a large berm in front of it. Guy Clare, [the applicant's] builder, said there was a little bit of slope there. Steve said there was some discussion about the average height. That was usually based on having a different dimension as you measured from the ground up to the roof as you went around the building. They didn't have that represented here. He asked the builder if he thought the height would be 7 feet 9 inches from the grade outside the building even though the interior floor was below that. Guy said it was 7 feet 9 inches was from the floor to the top of the flat roof. Steve checked that the grade was above that. Guy confirmed. Steve concluded that from the grade, it would be less than 7 feet 9 inches. Guy agreed. Frank said it appeared they were close if not at 7 feet 6 inches compared to 7 feet 9 inches.

Steve said it seemed like this second go-round was based on having concrete in the ground and not wanting to redo it in a new location. If there was no concrete in the ground, might they be able to move it back behind some of those trees where the new wing was going to go to minimize the amount of the variance? Someone in the audience said yes.

Wally read from pg. 2 of [attorney] Ken Kalvig's letter: "The Staff Report states that "[o]ther lots along Skidoo Lane have reduced setbacks similar to what the applicant proposes," but there are not facts in the record about these other lots." Based on Jacob's finding in the picture and what they were just told, one of the other lots that had a similar lack of setback was the adjacent lot next door. What Ken Kalvig wrote to say there were no other lots similar to this wasn't true, and the photograph was in the record. He understood the issue was height, and also color or appearance. Those were mentioned as the 2 biggest issues, with height and being able to see over it as the largest question. The issue became what was the height that didn't screw up the view if a variance was done either here or up further like Steve mentioned. It wasn't accurate that there were no other lots with the same issue of no setback.

Frank asked if the height issue was resolved. Steve thought it was minimized. Roger referred back to a photo shown earlier. He thought it would be easy to figure out. He described how Carstens could determine this. If the Board thought they would approve this, he handed out some revised conditions for them to consider. (See attachments to minutes in the May 2018 meeting file for handouts.) Their concern was also that this would become a guesthouse or bunkhouse rather than a boat house. He pointed to his change in condition #1 for a dry structure. For condition #5, he suggested a timeframe to replace 'immediately'.

Roger said his suggested change to #7 stemmed from a concern that came up last time about an existing trailer there where they were using a holding tank. People were in that guesthouse all the time and the holding tank got overloaded. He could smell it from his deck. Ann Gibson's brother, Jerry Blake, had asked him in the past if they could hook up to his septic system in exchange for using [the Blake-Gibson] well. Ann didn't want to do that. His septic system was designed for a 4-bedroom house [and they had] a one-bedroom cabin. His concern with the lakeshore was that now in the spring, there were algae loaded on the rocks. He worked at the Biological Station for 3 years when he first came to the Flathead in the 1980's. They studied septic contribution to Flathead Lake. After seeing that, and seeing the holding tank, there was a direct connection, which was why he'd added to condition #7.

Regarding #12 and #14, Roger said this had been going on for a year and a half. They should wrap this up in a year. He didn't think an extension was appropriate. He'd added #15, which went back to the siding issue, where they didn't want to see steel siding. Their cabin was batten and board. Everything was wood around there.

Frank turned to the discussion on findings. Steve had a problem coming up with findings that would justify granting this variance. He referred to A on pg. 9 and whether or not use of the property included having a boat and water-related equipment storage building close to the water. They needed some discussion as to the fact that everybody else had one or that it was hard for someone to use their lake-related property without having storage, or something like that. He had a problem with the item on pg. 11 where the variance requested was the minimum variance to alleviate the hardship. He could draw a 10-foot by 20-foot building on the diagram that fit in behind two trees in the corner of the

L-shaped cabin on the same side there that didn't violate setbacks. He thought this application was greatly affected by the investment in the unpermitted structure. If they looked at this as if they were starting from scratch and applying to build a boat storage building down by the water, they would have come up with a location that at least minimized [the variance]. They might have something that went into the 15-foot setback on the side in the 50-foot buffer zone, or maybe would go a few feet into the 10-foot side one. They could come up with a location that might have a much smaller variance than right up against the property line. He couldn't justify that. If [the Board] thought that they could write those two in such a way that they could justify it, he would be interested in hearing about it. He didn't see a way to do that.

Frank commented that from a general overview, it was not a new application for a new building in a new location. There was an existing structure and existing concrete. They were looking at the purpose of this Finley Point zoning, which was in essence to reduce environmental impacts. He didn't think that moving the building and tearing out the concrete met that criteria. In the previous hearing, they talked about preserving the lakeshore buffer strip and not disturbing it and planting vegetation. As a practical matter, if you were going to tear up a bunch of concrete next to the lake, there would be environmental degradation. He thought it was reasonable to say most properties had a boathouse or a lake-related storage building and that was a reasonable use. To move it away from the lake seemed like an unreasonable use. If you went back to the argument about the 50-foot buffer strip, by moving the building away from the lake, you'd increase the traffic across that total 50 feet if the impacts of traveling across the buffer strip were a concern. He didn't see that as being that big of a deal. He was talking about a concept that fit within the framework of protecting the lake. The problem with the structure was the height from what he heard. That seemed resolved. He didn't have a problem with requiring wood siding, which was what he assumed. He also would probably object to a metal box.

Regarding protecting the lake, Steve thought there was an issue of precedent. The construction work involved in removing the unpermitted new construction wasn't a lot more than continuing the construction. Most of the risk was the construction activity, of digging and disturbing the ground and so forth that went on until the structure was done. Building more structures around the lake, close to property lines and close to water, based on establishing a precedent here, might be critical for the long term. He didn't know that removing what they'd done created a lot of impacts to the lake. Frank said he jackhammered a slab once and it made a big mess, more so than tearing down an old log structure and putting siding on. Soils would be disturbed and you'd have to revegetate. He thought it was a bigger impact.

Mary said if they were required to tear down the new construction and the slab remained, then the ground wouldn't be disturbed much. She wouldn't want it to look that way, but what if they left the foundation? Melissa didn't think they'd want to do that. Mary said they should have thought about this before they began building. Frank said it was impermeable surface. He asked if they would need a permit to leave it. Jacob said they needed one to put it in and they didn't have that yet.

Frank thought that based on the original discussion about the height of the roof and the finish of the exterior, they could make this work. It would certainly be an improvement over what was there right now. Could they tear down the new structure and leave the old log structure up? Jacob said there wasn't enough there. There was nothing to support it now. Mary asked if they could rebuild it. Jacob replied not without a permit. Frank noted the relationship problem between neighbors. Jacob suggested they could agree to support each other's variances.

Wally observed that the added conditions that Roger Noble had were tied reasonably to the question of a variance, with the exception of the issue of making them upgrade the septic system now to a category 2 system. He couldn't relate the two. This was the height and the structure. He wished they didn't have a permit for a holding tank but they did. Until that had to be replaced, he had no tie for making it go away. Roger noted the permit had a caveat. It was issued on 5/29/96. A letter was attached to it from Laurie Ellenwood of the Environmental Health Department, dated 1/11/2000. He read from the letter, which mentioned the system was designed for temporary occupancy, with the County's database showing two solid waste fees, therefore she assumed the guest cabin had been built. Roger said it wasn't a guest cabin. After some discussion about it, he agreed they lived there all summer long. Mary thought they were here to discuss the little log building.

Frank suggested they go over conditions. Steve said the findings of fact had to support their action. On pg. 10 in E it said no other location for the building would minimize the amount of the variance. He didn't think that was true. He thought it has to be rewritten to justify this. If they wanted to rewrite and say the environmental impacts of tearing out the existing unpermitted foundation were such that they had to use the existing foundation then that needed to be written in. Mary termed it a footprint. It really wasn't a foundation for the old building. Steve said the reason they wanted to have it in this location was because the concrete was already in the ground. Somehow, that needed to be written in there. He didn't know if that really stood up. If Frank wanted to make a motion and not change the findings of fact, that was up to Frank. The rest of them got to decide whether they wanted [to go with that]. Jacob pointed out they needed to consider they were talking about a boat/ lake-related structure. It was true they could put it on the back corner; it wouldn't fit the use they proposed. Steve explained he was looking at moving it back 10 feet. Jacob gave clarification that the holding tank location was right behind it. It couldn't go back 10 feet. Steve clarified in turn that he wasn't going any farther back than the back of the [new unpermitted structure]. He was just going from the new one over towards the cabin. The structure he drew in would fit in the L-notch of the cabin. Mary asked if that would be on the [existing] slab. Steve said it would not. Frank thought it could be moved. He still felt jackhammering up concrete would have an environmental impact. Steve said if that was the reason they had to give the applicants the size of the variance, then that needed to be written in the findings of fact. Right now, saying that there wasn't a way to minimize the variance didn't stand up. He thought it could be moved over rather than being right next to the property line. It could certainly be moved over 5 feet, and maybe even 10. That would mean they would be giving the

minimum variance as required. Jacob said by building it where it was, they were allowed to maintain the vegetative buffer that the zoning required them to do because it was within the 50-foot vegetative buffer. If they moved it 5 feet sideways, they had to take out what vegetative buffer they had. Steve said that was why he said he was suggesting moving it 10 feet back, behind the two trees that were next to one another, and in the L-shaped area. It fit there. It was hard for him to say the original location was the minimum amount of variance that met the requirements. He couldn't say that. If Frank could say that, he could [rewrite it]. Jacob said if it went there, they could attach it to the house and go up 30 feet. Mary said otherwise it was right next to a window.

Frank repeated he thought moving the structure and removing the existing concrete could adversely impact the environment. That was the way he would write it [in G]. Shawna asked if that would set a precedent where the next time you wanted to build something without a permit, you'd just pour concrete and then it would be okay. Frank thought every matter that came before the Board set a precedent in some way, however it was a specific decision for the specific case before the Board. He didn't see a problem with looking at each issue separately on its own merits. He could easily defend a decision made today that didn't necessarily allow something else to happen that might be considered to be similar. If he was on that side of the table, he'd probably argue that point.

Roger said if they were to move it back, they'd have to take off that back end. Wasn't that going to be a bathroom? Someone in the audience said yes. Roger said that had to come off anyway. If they moved it back, there was more and more concrete and then you'd have to take off the front of the thing. He thought it would be better to leave it in the existing footprint. That would lead to the least amount of impact and degradation. He would rather see that than try to jockey it around. He'd rather just see them wrap it up to where the end of that original south end was. They'd extended beyond that so they still had to take that back wall off to bring it back into the footprint. He recognized that they had an investment there. Let's just chop it off where it was supposed to be and move on.

Wally said if that was the case where the Board went, then Roger's conditions regarding the issue of height, the issues of use and the issue of material or compatibility/ aesthetics needed to be in. They could limit use as a condition of the variance. It was not a bedroom or 'wet' facility. Frank said the conditions already specified 'dry'. Roger said they could come back with a variance requesting a bathroom. He was trying to preclude that. Frank read the existing condition with 'dry'. He didn't have a problem adding 'and will permanently remain a dry structure'. He didn't think they needed to put in recording it as a deed restriction. In terms of height, could they agree on a maximum average height above grade? It seemed punitive to have a professional licensed surveyor to measure the height of the cabin. Steve said if they were going make findings that allowed them to use the concrete that was there, then it seemed like you could measure off of the floor of the concrete. They said the 7-foot 9 inches was what they could build to off the floor of the concrete. If the grade of the ground was above that, you would be down to 7 ½ feet or even less, which was what had been measured from the ground.

Roger said people were using an arbitrary datum to figure out where the ground surface was and how high this thing was so that's why he was trying to go with the surveyor. If they said from the floor of the structure to 7 feet 9 inches, [he was for that]. Frank confirmed with Roger that this was to the top of the roof, not to the rafter. Roger said it was a concave roof now which was nicer to look at. They didn't know what the roof would be. He was concerned a steel roof would shine. Jacob said the building materials would be subject to the lakeshore regulations, which specifically stated they could not be reflective and they had to be natural colors.

Frank said on #7, the holding tank was a concern beyond the scope of this board. Steve suggested [the neighbors] could bring it to the Environmental Health Dept. if they thought the permit was being violated. Frank thought that all that was left was natural wood, and they all thought that was reasonable in #15. Mary mentioned this was considering they didn't get a variance.

Frank asked if they needed to do another finding. Steve replied he didn't know; Frank was the one who needed to decide. Frank said he wanted to get a consensus. Steve pointed to G on pg. 11. He thought wording needed to be added that said this was the minimum variance, not because there was no other location to put it but because you already had concrete in the ground and you thought it was too big of an impact on the environment to take the concrete out, if that was the finding that Frank thought would justify claiming that this was the minimum variance that would alleviate the hardship. Frank read the last sentence in G. They could say that moving the structure could adversely impact the environment.

Wally suggested saying you were *preventing* expansion of a nonconforming use. Mary liked that. Wally added you were *preventing* further harm to the viewshed of the adjoining property, you were *preserving* the historic use of this portion of a site and you were *protecting* from further degradation of the adjoining property and this property by limiting expansion of or changes of the use or footprint. Someone asked if you were *promoting* something. Mary specified 'original' before 'footprint'. Steve said they were promoting pouring the concrete and then going to get the permit. He was afraid they were *promoting* not getting the permit and asking for forgiveness. Wally said in one sense, that was one [consideration]. The other part actually was that he thought this was the minimum way to preserve, prevent and protect what could happen. If they did move the structure and made it higher and of the wrong material, that would do a lot more damage to the Nobles' viewshed. He thought Roger's point was really good. If they expanded in the sense of his comments about there was probably more disruption to tear this extra stuff out but if they didn't limit the use [of] bedrooms, no [increased use] on the holding tank, etcetera, the potential lake degradation was far more if they didn't touch the issue of use. This was a target window where for the first time, they could deal with the question of use and that expansion. That wasn't a reward for having done without a permit because their intension was clearly to expand the use, expand the nature of what was there and change it completely. They didn't get to do that part of what they intended.

Wally thought they should add one other condition. He and Jacob looked at the site on Monday and they were a little disappointed. The condition was that the County was going to go check later. He didn't think it was unreasonable to say this was done by the end of summer or by the fall. A year from now etcetera, they needed to be able to go look and make sure that the use hadn't expanded, the footprint was right and the height hadn't changed. He didn't want to put neighbor against neighbor where they had to be the neighborhood police. It wasn't unreasonable for the [inaudible] condition to be that the Planning Office and staff would do that. Frank assumed that was always a condition. If not, that should be made a boilerplate conditions. Wally thought that was an excellent idea. It wasn't standard but he'd seen it.

Rob said there were two different items. The first was that in terms of Planning staff, they interpreted this as a conforming use. It was a nonconforming structure. They would recommend that the findings said 'use of a nonconforming structure' rather than a nonconforming use, back where [Wally] talked about the nonconforming use of the structure. It wasn't the use that didn't conform—it was the structure. Secondly, staff wanted clarity. They didn't disagree with the necessity of a stormwater management plan. If this were approved, regarding 'the approved stormwater plan shall be implemented within 30 days after issuance of a permit' [in Roger's suggested revised condition #5], typically they weren't supposed to start construction until issuance of a permit. Perhaps that could be clarified or perhaps within 30 days after completion maybe there was some sort of staff visit to the site.

Steve asked Frank if he was adopting the conditions that Roger Noble was suggesting or if he made changes to the ones in the report. Frank listed the ones he would suggest. On #1, add 'and will permanently remain a dry structure.' Steve asked about #5, where Rob just said they shouldn't make that change. Jacob thought it should read 'shall be implemented upon completion of the structure.' Rob said they were picturing a permit being issued and then staff had to require them to complete their stormwater management plan and they hadn't even started construction yet. Steve asked if he was talking about completing the plan or implementing the plan. Rob said implementation. Jacob said 'the plan shall be implemented upon completion of the structure.' Rob said you could include language for best management practices (BMP's) if that was a concern, or [inaudible] the neighbors during construction. Dave suggested the stormwater plan be submitted and approved prior to construction and then there'd be a follow-up inspection to determine compliance. Jacob said it had to be reviewed and approved prior to issuance of a permit, and implemented on completion of the project. That was how they normally did it.

Frank asked if condition #9 covered it or if they needed to cover BMP's. There would still be a little bit of concrete to remove. Maybe they needed to throw in the boilerplate requirement for BMP's to protect the lake.

Wally said from the legal end, one other thing needed to be clear. He appreciated what Rob said about allowing a nonconforming structure but it was a legal use, in the sense of having the boat storage. They needed to make it very plain that it was a limited use. The

variance was for a use, not an expanded or changed use. It was for this purpose or use. He didn't know how else to word that but he thought they needed to make that very plain. Part of the conversation tonight was all those issues. They needed to make that in the record.

Steve said in condition #2 it said 'the lake-related storage building (boathouse)'. Those were defined in the Lakeshore Protection regulations. A boathouse didn't include living there or having a bathroom. Wally said if that got them there, he was cool with that. He just wanted to make sure. Frank suggested an addition of limited use for condition #1. Jacob thought that might be confusing. It could be fully used as a boathouse but nothing else.

Lita asked for clarification on the conditions and terms, since she hadn't received a copy of Roger's suggested revisions. Jacob advised working from the conditions in the report. Frank listed the following changes:

- Condition #1, pg. 12: Add 'and permanently remain a dry structure' to the end.
- Condition #5, pg. 12: After 'shall be implemented', replace the rest of the sentence with 'upon completion of the structure.'
- Added condition #15, pg. 13: Frank read what Roger Noble suggested. Jacob thought they could just say that it has to comply with the Lakeshore regulations. Frank agreed. That would cover the roof as well.

Rob said the neighbor proposed a timeline, which they had discussed. He wanted to be clear on that as well. If this was approved, did they want this as the staff recommended or as the neighbor had proposed? He just wanted clarity on the timeline. Jacob specified that it was written with standard language that everybody else got. Frank didn't see a problem with the way it was written. He asked about the other question on G in the findings and if what Wally suggested as additions were included. Jacob said it was on the meeting tape. Frank said they would incorporate those comments on item G, pg. 11. Lita confirmed with Jacob that this was the comment with the P's. (See paragraph with italicized words on pg. 17 of these minutes.)

Motion made by Frank Mutch, and seconded by Mary Jensen, to approve the variance to rebuild the structure less than 10 feet from the property line be approved subject to the findings and conditions that they'd discussed, both written and on the tape. Motion failed for lack of quorum, 2 in favor (Frank Mutch, Mary Jensen) and 2 opposed (Steve Rosso, Don Patterson). (Three votes required for a motion to pass.)

[A person in the audience] asked if that meant they had to take it out. Staff answered yes. Jacob said it meant they had to remove it. Everything went away. It kind of set a precedent for future variances within the setback.

MINUTES – Deferred per agenda

Frank Mutch, chair, adjourned the meeting at 7:37 pm.